OSRAM OPTO SEMICONDUCTORS (MALAYSIA) SDN BHD v. OOI MEI CHEIN & ANOR

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
SUPANG LIAN JCA
AHMAD ZAIDI IBRAHIM JCA
[CIVIL APPEAL NO: P-01(A)-525-09-2021]
29 MAY 2024

Abstract – *An employer, in the exercise of its managerial prerogative, may decide on the size of its workforce and even downsize it if outsourcing and computerisation and of late, artificial intelligence, can make it more lean, effective and efficient. What is important and crucial is that the retrenchment exercise must be done bona fide and not in bad faith. It must not be for a collateral or colourable purpose under the guise of corporate restructuring to make it more competitive with its cost-cutting measures or its focusing on its core business.*

ADMINISTRATIVE LAW: *Judicial review – Appeal against decision of High Court – Employee retrenched from employment – Allegation by employee that her roles, functions and duties continued to exist – Industrial Court found that employee's termination on ground of redundancy was fairly done and redundancy package was reasonable – High Court quashed and set aside award of Industrial Court, granted reinstatement and awarded employee punitive compensation – Whether retrenchment bona fide – Whether reinstatement ordered conducive for industrial harmony – Whether punitive compensation awarded reasonable*

LABOUR LAW: *Employment – Dismissal – Retrenchment – Redundancy – Employee retrenched from employment – Allegation by employee that her roles, functions and duties continued to exist – Whether retrenchment bona fide – Whether there was redundancy – Whether overall business of employer improving and expanding – Whether there was proof of cost-saving from restructuring exercise – Industrial Relations Act 1967, s. 30(5A)*

The respondent had served the appellant ('company') as its Head of Treasury and Commercial Administration Services before finding herself retrenched. According to the company, it had outsourced its accounting and treasury functions to a Global Shared Services Organisation ('GSS') such that the respondent's role had become redundant. The respondent, on the other hand, argued that (i) her services were still relevant and needed as only certain functions were taken over by the GSS. Much of her duties remained intact like accounts payable and accounts receivable and the departments under her like accounting, taxation, treasury and commercial administration were then

parked under a new head of department; and (ii) the overall business of the company had grown with some three-fold increase in revenue and overall, her roles and responsibilities had not been significantly reduced. Indeed, according to the respondent, 19 functions and 15 roles of hers remained intact. The Industrial Court, however, disagreed with the respondent's contentions and found that her termination on the ground of redundancy was fairly done and that the redundancy package was reasonable in the circumstances of the case. The respondent applied to the High Court, by way of a judicial review, to quash and to set aside the award of the Industrial Court. The High Court found that the respondent's remaining work functions could not simply be redistributed to other departments for no good reason and moreover there was an increase in revenue and net profit of the company during the relevant period. The High Court quashed and set aside the award and granted reinstatement as well as backwages of 24 months and punitive damages. The respondent went back to work and remained in service even up to the date of the present hearing of the appeal. The issues that arose in the present appeal were: (i) whether the retrenchment was done *bona fide* having regard to the fact that (a) the respondent's roles, functions and duties continued to exist; and (b) the company's overall business was improving and expanding and there was no proof of any cost-saving from the restructuring exercise; (ii) whether reinstatement, in the circumstances of the case, could not be conducive for industrial harmony; and (iii) whether the punitive compensation awarded was reasonable.

Held (dismissing appeal)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) Out of the 19 roles, only three roles were partially outsourced to GSS. The remaining 16 roles, which encompassed functions and responsibilities, remained with the respondent. This was a relevant factor that the Industrial Court failed to address. The respondent's case was not a case where her roles and with that, her functions and responsibilities, having disappeared but rather one where these had been consolidated into the financial accounting department and handled by the Senior Manager of Financial Accounting holding the lower position of GE 14 and not that of a director. It was incumbent on the company to show that such a restructuring would be more efficient and cost-effective that the roles, functions and responsibilities of the respondent had not been reduced but redistributed to three other managers and further, that her responsibilities had expanded with the introduction of GST. Instead, what was not disputed was the two new managers were hired from outside to take over the respondent's workload. The respondent's department continued to exist and it was just renamed. Her very staff were parked in this department while two others were parked

in another department. Such a change appeared cosmetic rather than core changes calculated for cost-cutting and capacity building. The Industrial Court had concluded erroneously when it held that the retrenchment was justified. Any reasonable tribunal properly addressing the evidence before it would have come to the conclusion that the retrenchment exercise rendering the respondent redundant was not carried out *bona fide* but was undertaken for an oblique and collateral purpose of getting rid of the respondent for reasons best known to it. (paras 35, 37, 39, 40, 43 & 44)

(2) Financial indicators of growth and expansion of the business would normally militate against any reasonable justification for retrenchment though in some cases, prolonged cash flow problem and increased costs may be relevant factors to consider. However, the drift and direction of the evidence before the Industrial Court was on all significant counts, positive of growth and profits. The picture painted even from the company's own documents was not that of a despairing downturn or a depressing doldrum but that of a positive prospect and growth. In failing to take into account key relevant factors and in taking into account irrelevant factors, the Industrial Court had fallen into error in concluding that the redundancy was because of the then prevailing economic climate when there was no evidence to support that conclusion. The award, founded on no evidence justifying a retrenchment, ought to be quashed for being irrational and illegal and so was rightly set aside by the High Court. (paras 58, 61 & 69)

(3) The respondent herself had testified before the Industrial Court that she could no longer trust her superiors and colleagues. Specific names were mentioned and she gave reasons for this mistrust. There had been a breakdown of the element of mutual trust and confidence so necessary for key staff at the director level to be able to discuss matters in confidence, to share setbacks and challenges, to strategise and to persuade and dissuade amidst doubts and uncertainties that would assail every global industry. Taking all the delicate and dynamic factors into consideration, this was a fit and proper case for the award of compensation *in lieu* of reinstatement. The compensation of one month's pay for every year of service including the one year that she had worked during the reinstated period would be taken into account and the compensation would be RM804,650 (RM32,186 x 25 months) to be paid by the company to the respondent. (paras 77, 78 & 99)

(4) An award of punitive compensation would be best reserved for those egregious cases where the conduct had been high-handed and reprehensible. Bearing in mind that the quantum of the punitive compensation awarded by the High Court was about 1.5 times the

respondent's pay, the court was not inclined to disturb it having regard to the fact that this was a retrenchment exercise that resulted in the respondent alone being singled out for retrenchment when the reasons had been found to be wanting. (paras 100 & 101)

Case(s) referred to:

Bayer (M) Sdn Bhd v. Ng Hong Pau [1999] 4 CLJ 155 CA ***(refd)***

Dynacraft Industries Sdn Bhd v. Kamaruddin Kana Mohd Sharif & Ors [2012] 9 CLJ 21 FC ***(refd)***

East Asiatic Company (M) Bhd v. Valen Noel Yap [1987] 1 ILR 363a ***(refd)***

Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors [1996] 4 CLJ 747 CA ***(refd)***

Hong Leong Bank Bhd v. Phung Tze Thiam John Phung [2008] CLJU 921; [2008] 1 LNS 921 CA ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal [1997] 1 CLJ 665 CA ***(refd)***

JT International Tobacco Sdn Bhd v. Lau Thow Sin [2006] 2 CLJ 79 HC ***(refd)***

KFC Technical Services Sdn Bhd v. The Industrial Court Of Malaysia & Anor [1992] 1 CLJ 437; [1992] 2 CLJ (Rep) 634 HC ***(refd)***

Md Nor Kassim v. Malayan Banking Berhad [2017] CLJU 506; [2017] 1 LNS 506 CA ***(refd)***

Norizan Bakar v. Panzana Enterprise Sdn Bhd [2013] 9 CLJ 409 FC ***(refd)***

Novartis Corportion (Malaysia) Sdn Bhd v. Mahkamah Perusahaan Malaysia & Ors [2022] CLJU 1097 CA ***(refd)***

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Sanbos (Malaysia) Sdn Bhd v. Gan Soon Huat [2021] 6 CLJ 700 CA ***(refd)***

Saw Kong Beng v. Mahkamah Perusahaan Malaysia & Anor [2016] 8 CLJ 891 HC ***(refd)***

Sivabalan Poobalasingam v. Kuwait Finance House (Malaysia) Bhd [2016] 1 ILR 542 ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

William Jack & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 CA ***(refd)***

Woo Vain Chan v. Malayawata Steel Bhd [2016] 10 CLJ 176 CA ***(refd)***

Yeo Ting Hui v. UPECA Technologies Sdn Bhd [2019] ILRU 1251; [2019] 2 LNS 1251 ***(refd)***

Zurich Takaful Malaysia Bhd v. Mahkamah Perusahaan Malaysia & Anor [2020] CLJU 605; [2020] 1 LNS 605 HC ***(refd)***

Legislation referred to:

Industrial Relations (Amendment) Act 2020, s. 33C

Industrial Relations Act 1967, ss. 20(1), (3), 30(3), (5A), (6)

For the appellant - Arumugam Ganapathy & Moses Mathew George; M/s Ghazi & Lim
For the 1st respondent - Pravin Kaur Jessy & Nor Azrah Mohd Salim; M/s Jessy & Assocs

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review No. PA-25-51-08-2019 (affirmed in part).]

Reported by Lina E

JUDGMENT

Lee Swee Seng JCA:

[1] The respondent here, Ooi Mei Chein ("Mei Chein"), holding a senior position as the head of treasury and commercial administration services in a company, found herself retrenched, after 24 years of service. It was traumatic for her and more so when at the domestic front, she was going through the throes of a divorce and navigating the issues of custody and maintenance of children.

[2] The appellant company, called "OSRAM" in brief, is based in Penang. It is a premium supplier of semiconductor-based lighting products more familiarly known as LEDs. The appellant OSRAM was one of four business units in the OSRAM group of companies under its parent company OSRAM Gmbh in Munich, Germany ("the parent company").

[3] The appellant company said it had outsourced its accounting and treasury function to a Global Shared Services Organisation ("GSS") such that the respondent's role has become redundant. There was no oblique or collateral purpose from the outsourcing or right sizing exercise. It is a managerial prerogative after all for a company to determine the size of its workforce so long as the exercise is not done *mala fide* with the motive of removing anyone that has fallen into disfavour with the company.

[4] The workman on the other hand argued that her services were still needed and that only certain functions were taken over by the GSS. Much of her treasury duties remained intact like accounts payable and accounts receivable and the departments under her like accounting, taxation, treasury and commercial administration were then parked under a new head of department. She also highlighted that the overall business of the company had grown with some three-fold increase in revenue and that overall her roles and responsibilities had not been significantly reduced. Indeed, according to her, 19 functions and 15 roles of hers remained intact and that her services were still relevant and required by the company.

[5] The Industrial Court in, its award dated 29 May 2019, disagreed with her and found that the termination on 30 September 2015 on the ground of redundancy was fairly done and that the redundancy package was reasonable in the circumstances of the case. She applied to the High Court by way of judicial review to quash and set aside the award of the Industrial Court.

In The High Court

[6] The High Court on 23 August 2021, upon a judicial review of the award of the Industrial Court, quashed and set aside the award and granted reinstatement as well as backwages of 24 months and punitive damages and costs. She went back to work on 22 September 2021 and remained in service even up to the date of hearing of the appeal before us.

[7] The High Court found that her remaining work functions cannot simply be redistributed to other departments for no good reason and moreover, there was an increase in revenue and net profit of the company during the relevant period from 2014 to 2015. Aggrieved by the said decision of the High Court, the company as appellant had appealed to the Court of Appeal.

Before The Court of Appeal

[8] Before us the following issues were canvassed by the appellant company:

(i) whether the retrenchment was done *bona fide* and following established legal principles;

(ii) whether reinstatement in the circumstances of the case would not be conducive for industrial harmony; and

(iii) whether the punitive compensation awarded was reasonable in the circumstances of the case.

The Law On Judicial Review In Dismissal Cases Under The Industrial Relations Act 1967

[9] Much has been argued that it is perfectly proper for a High Court in hearing a matter on judicial review to consider the merits of the case as was held by the Federal Court in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1:

> [15] ... Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. *The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter*. Thus, the distinction between review and appeal no longer holds.
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> [19] Decided cases cited above have also clearly established that *where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matter into consideration, such findings are always amenable to judicial review*.
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> (emphasis added)

[10] The palpable paradigm shift from focusing on the process of decision making of a tribunal or the manner of arriving at a decision to scrutinising the substance of the decision or the merits of a decision emanated from the Federal Court's case of *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145.

[11] Be that as it may, there is still a distinction, though diffused, between a review and an appeal and any review of finding of fact must be a low-intensity review especially where findings based on credibility of witnesses are concerned. It has been said that a decision of an inferior tribunal may be quashed if the tribunal has failed to take into consideration relevant factors or that it took into consideration irrelevant factors or that it has misinterpreted the law or the relevant contract between the parties or that the decision arrived at is not supported by the facts or that it is so outrageous in its defiance of logic or of accepted moral standards that no reasonable tribunal with a proper appreciation of the facts as presented could have arrived at. See the Federal Court case of *Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2013] 9 CLJ 409.

[12] Thus in *Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* (*supra*) the scope and ambit of *Rama Chandran* (*supra*) was clarified and confined to as follows:

> [17] The Federal Court, in *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625 again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.
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> [18] The Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235; *National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam)* [2000] 1 CLJ 681; *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9; *Colgate Palmolive (M) Sdn Bhd v. Yap Kok Foong & Another* [2001] 3 CLJ 9. However, there are exceptions to this restrictive principle where:
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> (a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality, or
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> (b) there is no evidence to support the conclusion reached. (See *Swedish Motor Assemblies Sdn Bhd v. Hj. Md Ison Baba* [1998] 3 CLJ 288.

[13] In *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625 at p. 635, the Federal Court issued this cautionary caveat as follows:

> Clearly therefore, not every case is amenable to the *Rama Chandran* approach. It depends on the factual matrix and/or the legal modalities of the case. This is certainly a matter of judicial discretion on the part of the reviewing judge ...
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> ... There is still the question of whether the High Court had properly examined and appreciated the facts presented in the Industrial Court. *Could it be said, as the Court of Appeal had held, that no reasonable tribunal, similarly circumstanced, would have arrived at the decision which the Industrial Court had*? At this point, I find the following observation expressed by Sudha C.K.G. Pillay in her article "*The Ruling in Rama Chandran – A Quantum Leap in Administrative Law* [1998] 3 MLJ lxii" to be particularly apt. She said this:
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> > The new powers that have been entrusted to the courts are enormous and like any other powers are open to abuse. Thus, it is vital for the reviewing courts to display caution and circumspection in the exercise of these wider powers. To this end, the courts should not be quick to wield their new powers in each and every case that comes before it. It has to weigh a multitude of factors before coming to a decision to exercise such powers. In so far as the review of Industrial Court awards are concerned, the reviewing courts must balance not only the competing interest of both the employee and the employer but also the need to preserve the functions of the Industrial Court and to prevent the remedy of s. 33A from fading into oblivion and becoming obsolete. If the ruling in *Rama Chandran* is taken to authorize the exercise of the wider powers of the courts in each and every case where the award of the Industrial Court is challenged, the spirit in which these new powers was conferred by the majority in *Rama Chandran* will have been misunderstood and, perhaps, inadvertently, pave the way for an unnecessary emasculation of the functions of the Industrial Court.
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> The fear of unnecessarily emasculating the functions of the Industrial Court can be laid to rest if *the reviewing courts, in the exercise of their powers, constantly bear in mind that the review of the Industrial Court's award on the merits is akin to, though not the same as, the exercise of appellate powers. The courts should also remind themselves that the Industrial Court operates under the Industrial Relations Act 1967, in accordance with principles quite different from those in the civil courts*. For example, s. 30(4) and (5) of the Act stipulates:
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> > (4) In making its award in respect of trade dispute, the court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries;

(5) The court shall act according to equity, good conscience and the substantial merits of the case without regard to the technicalities and legal form.

(emphasis added)

[14] What by analogy may be similar to should not be equated to be actually the same as. A review may come close to resemble an appeal only when the decision of the tribunal cannot be justified at all, infected as it is with illegality, irrationality, procedural impropriety or proportionality. Otherwise, the court in exercising its review jurisdiction which is of a supervisory nature would be slow to disturb the finding of fact of the tribunal.

[15] Perhaps the discernible change has gained momentum with the passage of time as in there is nothing more powerful than an idea whose time has come, as Victor Hugo would say. The Industrial Relations (Amendment) Act 2020 which the new s. 33C came into force on 1 January 2021, reads as follows:

(1) If any person is dissatisfied with an award of the Court made under section 30 **such person may appeal to the High Court** within fourteen days from the date of receipt of the award.

(2) The procedure in an appeal to the High Court shall be the procedure in the Rules of Court 2012 [P.U. (A) 205/2012] **for an appeal from a Sessions Court** with such modifications as the circumstances may require.

(3) In dealing with such appeals, the High Court shall have like powers as if the appeal is from the Sessions Court.

(emphasis added)

[16] The diffused distinction between a review and an appeal has now been discarded altogether with respect to challenging an award of the Industrial Court which since its coming into force is by way of an appeal as if it is an appeal from the Sessions Court with the result that the Court of Appeal would be the apex court.

[17] This judicial review was still under the old regime before the coming into force of the Industrial Relations (Amendment) Act 2020.

Whether The Retrenchment Was Done *Bona Fide* Having Regard To The Employee's Roles, Functions And Duties Which Continued To Exist

[18] It is a recognised principle of industrial relations law that as part of the managerial prerogative of a company as an employer, the company may decide on the size of its workforce and even to downsize it if outsourcing and computerisation and of late, artificial intelligence, can make it more lean, effective and efficient. It may even hive-off any of its businesses, whether doing well or not, as part of its overall strategy in maximising shareholders' returns with an eye on long term sustainability and focusing on its core competence and competitive advantage.

[19] What is important and crucial is that the retrenchment exercise must be done *bona fide* and not in bad faith. It must not be for a collateral or colourable purpose under the guise of corporate restructuring to make it more competitive with its cost-cutting measures or its focusing on its core business. It must not be done for the purpose of getting rid of perceived stumbling blocks in old timers who may well have passed their prime to give way to young Turks who perhaps, oblivious to the risks ahead, are prepared to venture afar and "to boldly go where no one has gone before," to borrow the famous split infinitive from Star Trek.

[20] The company said the retrenchment exercise was undertaken with no ulterior motive, though only the respondent Mei Chein was retrenched. It was rather unfortunate that the services of Mei Chein were no longer needed. The GSS was set up by the company's parent company in Germany as part of OSRAM Group's cost-cutting programme acronymised as PUSH. One of the reasons stated in the notice of "termination of employment due to redundancy" was that: "the recent organisation rationalisation of the company had in turn resulted in **redundancy in certain positions**." (emphasis added)

[21] The respondent was later to learn that by "redundancy in certain positions" in reality boils down to one single position in her. It was an euphemism employed to exude an air of legitimacy to the retrenchment exercise that resulted in one person being retrenched.

[22] Realising that being retrenched and thus terminated from employment can be both traumatic and disruptive, the Code of Conduct for Industrial Harmony ("Code of Conduct") stipulated in para. (21) that there should be prior consultation with the employee concerned and retrenchment should be only as a last resort. After all, a termination on account of redundancy is not a termination for any misconduct but is necessitated because the service of the employee is no longer necessary whether it be downsizing and rightsizing as a company reorganises itself.

[23] In para. (22)(a) of the Code of Conduct, it is stated that if retrenchment becomes necessary, the employer should take the following measures in "(v) Spreading termination of employment over a longer period." Under para. (22)(b)(v), the factor of "Family situation" would be an objective criterion to consider. The respondent Mei Chein narrated below that she was not accorded such a consultation and that she had informed the appellant company of her divorce and the issue of custody of her two children and the adjustment that she had to make would not allow her to consider employment in Indonesia as suggested by the appellant company.

[24] We accept that the Code of Conduct is not statute law but suffice to say that it has been accorded due recognition under s. 30(5A) of the Industrial Relations Act 1967 ("IRA") where the Industrial Court in making its award may take into consideration the provisions in the Code of Conduct. Thus,

while compliance with the Code of Conduct is not a *sine qua non* in determining the validity of a retrenchment exercise, the Industrial Court may have regard to it in scrutinising more carefully the actions or inactions of an employer not in compliance with the Code of Conduct in its journey en-route in determining if the retrenchment is *bona fide* and not done in bad faith.

[25] Here there was no prior consultation. The first time Mei Chein had any indication that she would be retrenched was on 14 July 2015, when the new Chief Financial Officer (CFO) (COW7) orally tried to persuade her to accept a severance package as her services were going to be terminated. This was coming from someone who had joined the appellant company hardly six days before.

[26] However, that message does not seem consistent with the fact that she would continue to be the owner/process owner for the business processes of "accounts payable invoice verification", "accounts payable payment processing", "downpayment (assets only") and "accounts receivable" post the implementation of the GSS on 21 July 2015 as released by the company's immediate headquarter and approved by COW7 on 21 August 2015. See encl. 8 pp. 52-64.

[27] The communicated message of her retrenchment also does not jive with COW 7's presentation on 21 August 2015 during the monthly sharing (finance, IT, OPC) forum of the OSM commercial organisation chart effective as of 1 October 2015 (FY 15/16) which was for the following fiscal year (1 October 2015 to 30 September 2016) where she and her department were included in the commercial organisation. See encl. 8 pp. 6-7.

[28] In the face of the mixed messages she received, she thought it best and so on 24 August 2015, she raised a grievance with the appellant company as follows:

> As I mentioned to you, **even though A/P and A/R transactions have been outsourced to GSS** which is an OSRAM global initiative, **I will still be responsible for A/P & A/R processes at the high level**. In fact, this aspect of **my job has not diminished but has remained**. The aspect of managing the A/P and A/R staff has been transformed into that of managing GSS as the outsourced partner. Moreover, my functions in Cash Management, company Secretarial (Board of Directors) Matters, Bank Guarantee, Insurance, Bank Reconciliation, Governmental Reporting, Employee Claims, RIC/Internal Control, Commercial Administration, LEAN, and GST are **not affected by GSS and still remain**. There are still 6 people reporting to me currently. In fact, **my job scope has been expanded with the addition of GST**.
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> (emphasis added)

[29] One can imagine with the implementation of a new tax regime in the goods and services tax ("GST") came 1 April 2015, there would be the additional paperwork with respect to various submissions to the custom and excise department of the Royal Malaysian Custom on matters where the GST

is claimable or not claimable, those which are zero-rated and the initial teething problems not uncommon with the implementation of a new taxation paradigm. In fact, the introduction of the GST regime significantly expanded her job scope as she was responsible for three OSRAM companies with one in Germany and another in the United States besides the appellant company here. On top of that she was in charge of a thorough analysis and a continuing one at that and monitoring of another OSRAM company in Hong Kong.

[30] Instead of receiving a reply refuting the reasons given by Mei Chein justifying her position or perhaps calling for a consultation meeting to better understand each other's perspective on the problem, the company issued a letter on the same day 24 August 2015 titled "termination of employment due to redundancy" and telling her that her employment with the company would be terminated with effect from 30 September 2015. She appealed in writing no less than six times and the appellant company replied only once on 23 September 2015 brushing aside her grievances.

[31] Like most letters of termination, it has the effect of changing the whole trajectory of the employee's life as it did for Mei Chein. At that time of her termination, her last drawn salary was RM32,186. She found herself without a job for the next six years until the High Court ordered on 23 August 2021 her reinstatement within 30 days and she was so reinstated on 22 September 2021 and remained in employment even at the hearing of this appeal.

[32] For some people facing life's challenges, it never rains but it pours, and for her it was battling both the uncertainty of being without a job and the adjustment of being a single parent to two children, coping with the issues of custody, access, maintenance that flow from a divorce. Psychologists tell us that the two most stressful events in a person's life after death of a spouse or close family member would be a divorce and loss of one's job.

[33] She felt that she had been unfairly singled out for retrenchment and that many of her services would still be needed even with the introduction of the GSS. Her position as head of treasury and commercial administration was a director-level position tasked with the following duties and responsibilities:

> To strategize & manage including planning, organizing, directing, and controlling: Treasury Function: Accounts Payable (A/P), Accounts Receivable (A/R), Payroll, 1st respondent Secretarial (Board of Directors) Matters, Cash Management, Currency Hedging Management, Bank Guarantee, Bank Reconciliation, Insurances, Government Business Reporting, Employee Claims, Withholding Tax, Goods and Services Tax (GST), Risk Internal Control (RIC)/Sarbanes Oxley Act (SOA) / Internal Control, LEAN Initiatives, *etc. etc.* Commercial Administration Function: Signatory Authorization Management, Business Related Guidelines, Productivity Improvement Incentive (PII), Commercial Projects, *etc.*

[34] Learned counsel for the respondent Mei Chein highlighted that what were outsourced were some transactional works with respect to book-keeping and that her duties "to strategise and manage including planning, organising, directing, and controlling" remained very much intact even after the GSS went live on 21 July 2015. These "transactional works" would be lower end data entries which does not require a high level of professional skill training.

[35] Out of the 19 roles, only three roles were partially outsourced to GSS *ie*, accounts payable (A/P), accounts receivable (A/R) and payroll. The remaining 16 roles which encompass functions and responsibilities remained with the respondent Mei Chein, a relevant factor that the Industrial Court had failed to address.

[36] Before the implementation of the GSS, Mei Chein had 15 staff reporting to her and after, she still had six staff under her. See encl. 7 p. 161 and encl. 20 Q&A 18 at p. 370.

[37] From the evidence adduced by the appellant company, hers was not a case where her roles and with that, her functions and responsibilities, having disappeared but rather one where these had been consolidated into the financial accounting department and handled by the Senior Manager of Financial Accounting holding the lower position of GE 14 and not that of a Director. See the admission of the appellant at para. 13(a) of the SIR encl. 20 p. 150.

[38] The appellant company's evidence is that the respondent's roles, functions and responsibilities and with that the respondent's staff continued to exist and were merely transferred to other Departments Heads In Accounting, Taxation, Treasury & Commercial Administration; And Corporate Tax, Transfer Pricing and GST being another, after the respondent's termination. See encl. 8 pp. 139 to 140.

[39] It is incumbent on the appellant company to show that such a restructuring would be more efficient and costs-effective seeing that the roles, functions and responsibilities of the respondent had not been reduced but redistributed to three other managers, and further that her responsibilities had expanded with the introduction of GST.

[40] Instead, what was not disputed was that two new managers were hired from outside to take over the respondent's workload namely Jasmin Tan handling cash management, company secretarial, employees' claim/BG/RIC and A/R GSs (encl. 8 p. 139) and Annie Ng becoming the Corporate Tax, Transfer Pricing and GST Manager handling GST filing/Government Survey & Reporting/Insurance, GST Guidelines/Commercial Admin/AS table/PII (encl. 8 p. 140). As for tax compliance & Government Relations and A/P GSS this was under Yeap Hooi Lin (encl. 8 p. 139).

[41] What is more disturbing was that once the respondent had been retrenched, the appellant company brought back A/P and A/R GSS in-house again as can be seen in encl. 8 p. 139. The appellant company's own human resource VP in COW6 confirmed the said document (encl. 20 p. 372 Q&A 39-40). This is further corroborated by the appellant's own document, as highlighted by learned counsel for the respondent, in encl. 4 p. 205 which shows that GSS related matters (third box from the left) was still being conducted in-house; contrary to what the appellant had claimed.

[42] Learned counsel for the respondent pointed out that the appellant's own document (encl. 8 p. 139) showed that in April 2016 after the respondent's dismissal, A/R GSS (Low Bee Cheng) and A/P GSS (Khoo Hsu Fong) were still (in-house) under the Accounting, Taxation, Treasury & Commercial Admin Department wherein Treasury & Commercial Admin was formerly under the respondent.

[43] Enclosure 8 p. 139 proved that respondent's department continued to exist and it was just renamed wherein "accounting and taxation" was added in front of "Treasury & Commercial Admin". Her very staff (seven of them in total – confirmed by COW6 at Q&A's 30, 31, 31, 35, 36 37 and 38 encl. 20 pp. 371-372) were parked in this department. Another two staff were parked under the corporate tax, transfer pricing and GST (encl. 8 p. 140 – confirmed by COW7 at Q&A's 22-31 in encl. 20 pp. 394 to 395).

[44] Such a change appears cosmetic rather than core changes calculated for cost-cutting and capacity building. If managers have been well-trained by the respondent as director to now take over her place, one would have expected the appellant company to have a far bigger role for her after devoting the prime of her working life of 24 years to the appellant company rather than being rendered redundant and dispensable for having trained well juniors to take over her roles, functions and responsibilities and having three managers to do that with two brought in from outside.

[45] Her qualification for bonus payment for almost every year of her service would show that there was no problem with her performance. Confronted with these evidence of a lack of *bona fide* and transparency in the retrenchment exercise, the Industrial Court should have scrutinised the evidence further rather than skipping it altogether under the prerogative of the company having its unfettered discretion in deciding the size of its workforce in a corporate restructuring exercise.

[46] Instead, the Industrial Court had completely ignored the appellant's own documents namely the Treasury and Commercial Admin Department organisation chart (encl. 8 p. 75) and the OSM commercial organisation chart effective as of 1 October 2015 (FY 15/16) (encl. 8 p. 7) presented by COW7 during the monthly sharing (Finance, IT, OPC) forum held on 21 August 2015 (encl. 8 pp. 6 to 7) which clearly proved that the respondent's position, role and job scope remained post-GSS effective 1 October 2015 for 2015/2016.

[47] Where the respondent's roles remained substantially intact and foreseeably enlarged because of the implementation of GST that would impinge on the appellant company's transactions, it is not for the appellant by the stroke of a pen, to relegate the respondent to redundancy and to sideline her to surplusage and to be selectively singled out for the separation scheme. Indeed, it is consistent with the Code of Conduct for Industrial Harmony for the management to explore various options available to the parties from a voluntary or mutual separation scheme before settling for the inevitable result of a retrenchment so that the retrenchment is only as a last unfortunate resort for the survival of the company as a whole so that other employees may still retain their job with the other costs-cutting measures in place, painful as it may be.

[48] What has been underscored above brings to mind the decision of the High Court in *Saw Kong Beng v. Mahkamah Perusahaan Malaysia & Anor* [2016] 8 CLJ 891 which was a case involving removal of layers of management under the guise of restructuring for costs-cutting and efficiency. The High Court observed astutely as follows:

> [61] On the facts of the case, it clearly emerged that after the termination of the applicant, his job functions were still very much in existence in the company except that it was taken over by EC Ong who had joined the company some three months before the termination of the applicant. In addition, it was also in evidence that two subordinates of the applicant, namely, Chan Peng Loon and Christian Wolf had absorbed the applicant's remaining functions.
>
> [62] *Notwithstanding the terminology used to describe this absorption of functions, whether it was termed as delayering or that the functions were distributed upwards to the applicant's superior or downwards to his subordinates, the undisputed facts were that the job functions that the applicant performed were taken over by other employees* of the second respondent after his termination. This of course meant that the applicant's job functions were still in existence.
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> (emphasis added)

[49] Learned counsel for the respondent submitted that the above decision of the High Court was affirmed by the Court of Appeal and leave to appeal further was dismissed by the Federal Court.

[50] Learned counsel for the respondent also referred the court's attention to the case of *Yeo Ting Hui v. UPECA Technologies Sdn Bhd* [2019] ILRU 1251; [2019] 2 LNS 1251, where the Industrial Court when dealing with a case of alleged redundancy which bore an uncanny similarity with the instant case where the claimant's duties there were distributed to the other staff, observed as follows:

> [58] In regard to the Claimant's purported redundancy, the company in its own exhibit had shown that the Claimant had 11 job duties as I have set out earlier in this Award. Nevertheless, *in its effort to prove that the Claimant's role was redundant, it had adduced evidence pertaining to only 2 out of the 11 job duties, namely, making travel arrangements and taking down minutes.*

> *What about the other 9 job duties*? It was the Claimant's evidence that she came to know later whereby her duties to prepare meeting minutes had been given to Ms. Ho whereas her tasks of making travel arrangements were given to other staffs in the HR department to do. Therefore, she claimed that her job was not redundant. The company did not dispute this evidence and it remains on the record that 2 of her tasks were still existing and being assigned to other people as we have heard from COW1's evidence. Even then, the Court could not gather from his evidence what had happened to the other 9 job duties of the Claimant.
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> ...
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> [60] What is evident is that *the Claimant still had a role to play within the company. From the Company's own evidence, the Claimant's role and job duties were distributed to others within the company.*
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> ...
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> [64] However, in the present case, *the company has failed to show on a balance of probabilities how the Claimant's portfolio had reduced, diminished or ceased that she was said to have become surplus to the company*. In the context of employment law, as I have mentioned earlier in the Award, "redundant" is understood to mean that the employee is no longer required by his employer because the employer no longer has a need for the work that the employee was performing. I have analysed the Company's evidence in this regard as well as the Claimant's evidence that her tasks were distributed to others, which was not challenged by the company. I am of the view that her duties were still relevant in the company but they had been distributed to others whom (*sic*) were not named specifically. The 2 HR personnel who joined later after the Claimant had evidently left the company too.
>
> (emphasis added)

[51] Industrial jurisprudence is consistent in striking down a retrenchment exercise where the roles, functions and duties of the retrenched employee do not vanish or vapourise into thin air but remain very much vibrant and a vital component of the overall organisation chart, *albeit* redistributed to other personnel. Thus, in the High Court case of *Zurich Takaful Malaysia Bhd v. Mahkamah Perusahaan Malaysia & Anor* [2020] CLJU 605; [2020] 1 LNS 605 it was held:

> [18] Most importantly, in the instant case, the 2nd respondent's workload was taken over by Andrea Looi of ZIMB. Andrea Looi had to carried out the 2nd respondent's work on top of her own. In addition, the 2nd respondent's subordinates were moved to ZIMB and assisted Andrea Looi in carrying out the work including the 2nd respondent's work. This clearly showed that the 2nd respondent's work had not ceased to exist or diminished to justify the 2nd respondent's retrenchment.

[52] The Court of Appeal could not have expressed it better in *Woo Vain Chan v. Malayawata Steel Bhd* [2016] 10 CLJ 176, where it was clarified that:

> [17] ... It is essential that it is the job functions and duties that are affected and not merely the job title or designation. *If the same or essentially same work is found to be carried out under a different name or manner, there is no redundancy...*" (See "*The Law on Dismissal*" by Nallini Pathmanathan, Siva Kumar Kanagasabi and Selvamalar Alagaratnam).
>
> ...
>
> [19] The burden is on the employer to come to the court with concrete proof to establish that the employee is actually redundant, that he is discharged as surplus age to the company's requirement. There must be actual redundancy before a dismissal premised on the ground of redundancy could be grounded. *Merely by showing that the company was undergoing restructuring exercise will not suffice. In order to bite, it must be further exhibited through evidence that the exercise had impacted on the job function in such a manner that "it was reduced to such an extent that he was considered redundant"*
> ...
>
> (emphasis added)

[53] The Federal Court had in similar vein observed in *Dynacraft Industries Sdn Bhd v. Kamaruddin Kana Mohd Sharif & Ors* [2012] 9 CLJ 21 as follows:

> Consequently, the Court of Appeal held (and in our view rightly) that with the unchallenged evidence of Chow Heng Khow and Ch'ng Beng Tatt that *their respective jobs and workload were taken over by two other employees, and not eliminated or extinguished, redundancy was not proven, as mere reorganisation was insufficient to justify their retrenchment* which was correctly held to be without just cause or excuse, in this regard in *Bayer (M) Sdn Bhd v. Ng Hong Pau* [1999] 4 CLJ 155, Shaik Daud JCA speaking for the Court of Appeal said at p. 160:
>
> > On redundancy it cannot be gainsaid that the appellant must come to the court with concrete proof. The burden is on the appellant to prove actual redundancy on which the dismissal was grounded. (See *Chapman & Others v. Goonvean & Rostawvack China Clay Co Ltd* [1983] 2 All ER). It is our view that merely to show evidence of a re-organisation in the appellant is certainly not sufficient. There was evidence before the court that although sales were reduced, the workload of the respondent remained the same. After his dismissal his workload was taken over by two of his former colleagues, Faced with these evidence, is it any wonder that the court made a finding of fact that there was no convincing evidence produced by the appellant that the respondent's functions were reduced to such an extent that he was considered redundant.

[54] The Court of Appeal in *Bayer (M) Sdn Bhd v. Ng Hong Pau* [1999] 4 CLJ 155 ruled that even when the company's sale had been reduced but if the workload remained the same, the company must still adduce convincing evidence that the employee's function was reduced to such an extent that he was considered redundant.

[55] We are satisfied that the Industrial Court had concluded erroneously when it held that the retrenchment was justified on ground that the respondent's roles, functions, duties and responsibilities had ceased to exist when in fact the very own admission of the appellant company was that these remain but were redistributed to and headed by three separate managers, two of which were new intakes into the company and the staff previously reporting to the respondent were now reporting to their new managers.

[56] Any reasonable tribunal properly addressing the evidence before it would have come to the conclusion that the retrenchment exercise rendering the respondent redundant was not carried out *bona fide* but was undertaken for an oblique and collateral purpose of getting rid of the respondent for reasons best known to it.

Whether The Retrenchment Exercise Was Done *Bona Fide* Having Regard To The Fact That Overall The Appellant's Business Was Improving And Expanding And That There Was No Proof Of Any Cost Saving From The Restructuring Exercise

[57] The company had cited as one of the reasons for "termination of employment due to redundancy" the following ground: "present economic climate has severely affected our company and industry and unprecedented global financial downturn had severely impacted our company currently."

[58] Financial indicators of growth and expansion of the business would normally militate against any reasonable justification for retrenchment though in some cases, prolonged cash flow problem and increased costs may be relevant factors to consider. However, the drift and direction of the evidence before the Industrial Court was on all significant counts, positive of growth and profits.

[59] There was the company's investment of about €3 billion creating new growth prospects for the OSRAM group as a whole. See encl. 7 pp. 134 to 136. Nearer home there was the construction of a new LED chip plant in Kulim, Malaysia with an investment of about €1 billion (RM4.67 billion) as can be seen in encl. 7 pp. 130 to 148. Evidence was also led that until 2020, the average annual growth rates of 8% in revenue and 9% for EBITDA were expected. See encl. 7 p. 44.) EBITDA stands for "earnings before interest, taxes, depreciation and amortisation". It is a measure of profitability. The benefit of EBITDA is that it focuses on a company's core performance rather than the effects of non-core financial expenses.

[60] At the back of such an impressive array of financial indicators is that the adjusted EBITDA margin increases to more than 10% in fiscal year 2015 as can be seen in encl. 7 p. 40. Revenue was also up 8% almost stable on a comparable basis as reflected in encl. 7 p. 40.

[61] The picture painted even from the appellant's own documents was not that of a despairing downturn or a depressing doldrum but that of positive prospects and growth. COW5 admitted that the appellant's business in

Penang is growing against a backdrop of a global economic growth of 3% for 2015 as stated in its annual report. In fact, the revenue for the appellant for 2015 was an increase of 11% from the year before. Sales was up by 72% for LED's business in the Penang plant.

[62] The Industrial Court had failed to consider and appreciate that from the evidence of COW6, the human resource VP, he had admitted that there was no evidence of costs-cutting measures or of any unprecedented downturn. His evidence is that "Penang not on a downward trend" in encl. 20 p. 379. The opposite is true in that spending was on an upward trend. See the Q&A 80-103 at encl. 20 pp. 377-380. COW6 also admitted that there was no evidence before the Industrial Court that the appellant was suffering unprecedented global financial downturn.

[63] COW6 also reluctantly admitted that there was no evidence of the appellant company having undertaken an "organisation rationalisation" that resulted in its long serving senior employee of 24 years being the only one that had to be selected and singled out for retrenchment.

[64] The conclusion of the Industrial Court that she was really more concerned with the adequacy of the compensation package and its quantum rather than being retrenched, was misplaced. This is more a case of while hoping for the best one must be prepared for the worst. Going through the uncertainties of a divorce and the equally uncertain prospect of being able to get another job of similar status and remuneration at her age of 48 then, she would of course prefer not to be singled out for a retrenchment exercise especially when she could not see how her position, roles, duties, functions and responsibilities had been significantly reduced. Face with that double uncertainties one cannot blame her for appearing to be hard on negotiating for a higher retrenchment compensation if the inevitable has to come to pass.

[65] We appreciate that at the end of the day it is for a company to decide on the size of its workforce having regard to positive indicators of growth and how the company may still be more lean and efficient by outsourcing, off-shoring and harnessing shared services, IT and AI. See the case of *East Asiatic Company (M) Bhd v. Valen Noel Yap* [1987] 1 ILR 363a, where the Industrial Court noted that it is the right and privilege of every employer to reorganise his business in any manner he thinks fit for the purpose of economy or even convenience; and if by implementing a restructuring scheme for genuine reasons, there are excess employees to be discharged then the employer may proceed to do so.

[66] Likewise, in *William Jack & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235, it was stated that so long as that managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court.

[67] However, all that must be done as transparently as possible for transparency promotes truth and builds trust. In a case where the business is on an expansion mode with hard data supporting it and the company itself

A sounding its trumpet of new heights scaled, the Industrial Court must scrutinise any retrenchment exercise especially when only one senior staff is selected for separation to satisfy itself that the company was carrying out a *bona fide* retrenchment exercise where unfortunately it has to let go of its head of treasury and commercial administration services, a position akin to a B director-level of OSRAM.

[68] The High Court, contrary to learned counsel's submission on behalf of the company, did look at the "sea of evidence" and was not "island hopping" and the Industrial Court had failed to consider the financial indicators of the company and its group, all painting a picture of positive C outlook and the company's own admission that there was no cost-cutting measures taken nor any substantial costs-saving shown.

[69] In failing to take into account key relevant factors and in taking into account irrelevant factors, the Industrial Court fell into error in concluding that the redundancy was because of the then prevailing economic climate D when there is no evidence to support that conclusion. The award, founded on no evidence justifying a retrenchment, ought to be quashed for being irrational and illegal and so was rightly set aside by the High Court.

Whether Reinstatement In The Circumstances Of The Case Would Not Be E Conducive For Industrial Harmony

[70] The High Court in setting aside the award also awarded back wages of 24 months and ordered reinstatement within 30 days from the date of its order with no loss of seniority, service, pay, bonus, salary increment and all benefits of her employment. She went back to work on 22 September 2021 F and remained in service even up to the date of hearing of the appeal before us.

[71] The *ex gratia* payment of RM775,008.61 was also ordered to be paid back by the respondent to the appellant company within 30 days from the date of its order.

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[72] The appellant company submitted that the High Court had erred in making an order for reinstatement after a lapse of six years, where the dynamics in the workplace has changed dramatically and more critically, such a reinstatement would not be conducive for industrial harmony.

H **[73]** Moreover, there has been a breach of that enigmatic but essential element of mutual trust and confidence which one knows it if it is there and when it is not there one cannot pretend to have it. It is not so much that one cannot step into the same river twice as the philosopher Heraclitus would say but more a case of much water has flowed under the bridge!

I **[74]** The company was rightly concerned that at the trial in the Industrial Court, the respondent Mei Chein had produced an organisation chart of the company for 2016 and other documents of the appellant company which she claimed to have been dropped into her postbox, gratuitously and perhaps

even fortuitously, by an unknown kind soul. The organisation chart showed that her department was very much in existence. Though the company had disputed the genuineness of this document, it had not produced any document to the contrary.

[75] However, the company's consternation that the respondent is in breach of confidential information had prompted it to file a suit in March 2020 for damages for such a breach and we were told that the suit is still pending trial. It is not the business of this court to venture into the merits or otherwise of that civil suit between an employer and its employee for breach of confidential information.

[76] By no means are we saying that an employer should be as bad as it possibly could so that the Industrial Court would take cognisance that reinstatement would not be proper both psychologically and practically and that payment of compensation *in lieu* of reinstatement would be in place. One can perhaps recall how the character Shredder in the children's cartoon popular series Teenage Mutant Ninja Turtle, was so exhilarated with his evil exploits that he exclaimed: "It feels so good to be so bad!" For such a conduct and in an egregious case, the court may consider awarding punitive damages.

[77] Here, the respondent Mei Chein had herself testified before the Industrial Court that she could no longer trust her superiors and colleagues. Specific names were mentioned from that of the managing director, the regional CFO, the finance director, the site CFO to the senior HR director. She gave reasons for this mistrust and there is no need for this court to deal with the specifics. In short, she had been lied to and deceived by her superiors and colleagues in the run-up to her termination.

[78] Suffice to say that there has been a breakdown of the element of mutual trust and confidence, so necessary for key staff, at the director-level to be able to discuss matters in confidence, to share set-backs and challenges, to strategise and to persuade and dissuade amidst doubts and uncertainties that would assail every global industry.

[79] One cannot be always looking behind one's back to see if anyone has a dagger. Confidence once broken cannot be restored and while time may have its healing properties, it is a luxury that most companies can ill-afford. Much has been said about the constitutional "right to life" as encompassing even a "right to livelihood." We appreciate that the IRA is a piece of social legislation designed to provide some buffer to a dismissed employee who had been dismissed without just cause and excuse. Be that as it may, there is no such thing as security of tenure of office for jobs in the private sector. See the cases of *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261 and *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal* [1997] 1 CLJ 665; [1996] 1 MLJ 481.

[80] Our industrial jurisprudence is thus tilted towards protecting, as far as the law may afford, the source of livelihood of a workman. Barring misconduct and a genuine retrenchment, an employer cannot activate the clause on termination by either party by giving the requisite one or two months' notice, as the case may be, without the need to assign any reason though an employee would be perfectly entitled to do so. Thus, before the Industrial Court, an employer cannot argue that there is a valid termination because the notice period under the contract of employment for terminating the contract has been given to the employee unless it is a genuine employment contract for a fixed term in which case the contract of employment comes to an end with the effluxion of time.

[81] Whilst the main remedy in a case of dismissal without just cause and excuse is for the workman to seek reinstatement under s. 20(1) of the IRA, the Industrial Court is at liberty to grant compensation *in lieu* of reinstatement in situations that would justify it under the rubric that it would not be conducive for industrial harmony to so order reinstatement. It has also become axiomatic from decided awards of the Industrial Court as affirmed by our superior courts that such a compensation would be a month's pay for each year of service based on one's last drawn salary. This is captured in Practice Note No. 3 of 2019 of the Industrial Court of Malaysia on "guidelines governing awards in dismissal cases" dated 1 November 2019.

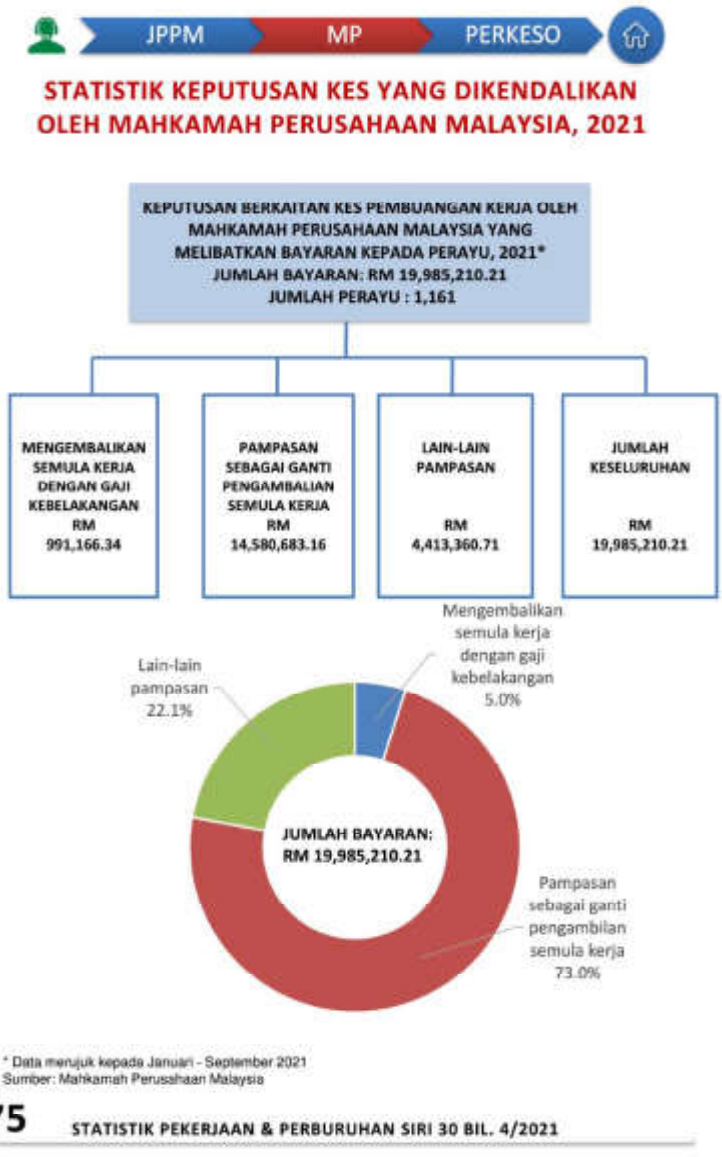
[82] The representations to be "reinstated to his former employment" under s. 20(1) of the IRA does not have to end there and if it does not in that there is no settlement for whatever reasons, there is open to him a whole wide vista of reliefs that the Industrial Court may award him if he succeeds when the dispute is referred to the Industrial Court. Section 30(6) of the IRA provides that:

> (6) In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under subsection 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under subsection 20(3).

[83] Thus, it was said in *Sanbos (Malaysia) Sdn Bhd v. Gan Soon Huat* [2021] 6 CLJ 700 as follows:

> [26] Thus, it must be noted that "reinstatement" is not the only reason for a dismissed employee to make representation to the Director General under s. 20(1) of the Industrial Relations Act 1967 (Revised 1976) with a view of having his case referred to the Industrial Court. **He may avail more generous damages in the form of compensation and back wages from the Industrial Court as compared to what he can get under common law**.
>
> (emphasis added)

[84] The statistics of the Industrial Court as gleaned from the report of the Human Resource Ministry for 2021-2023 showed that reinstatement cases do not exceed 5.0%, 1.3% and 3% of the cases that came before it in the year 2011-2023 respectively. The charts are set out below:


JPPM
MP
PERKESO
STATISTIK KEPUTUSAN KES YANG DIKENDALIKAN OLEH MAHKAMAH PERUSAHAAN MALAYSIA, 2021
KEPUTUSAN BERKAITAN KES PEMBUANGAN KERJA OLEH MAHKAMAH PERUSAHAAN MALAYSIA YANG MELIBATKAN BAYARAN KEPADA PERAYU, 2021*
JUMLAH BAYARAN: RM 19,985,210.21
JUMLAH PERAYU : 1,161
MENGEMBALIKAN SEMULA KERJA DENGAN GAJI KEBELAKANGAN RM 991,166.34
PAMPASAN SEBAGAI GANTI PENGAMBALIAN SEMULA KERJA RM 14,580,683.16
LAIN-LAIN PAMPASAN RM 4,413,360.71
JUMLAH KESELURUHAN RM 19,985,210.21
Mengembalikan semula kerja dengan gaji kebelakangan 5.0%
Lain-lain pampasan 22.1%
JUMLAH BAYARAN: RM 19,985,210.21
Pampasan sebagai ganti pengambilan semula kerja 73.0%
* Data merujuk kepada Januari - September 2021
Sumber: Mahkamah Perusahaan Malaysia
75
STATISTIK PEKERJAAN & PERBURUHAN SIRI 30 BIL. 4/2021

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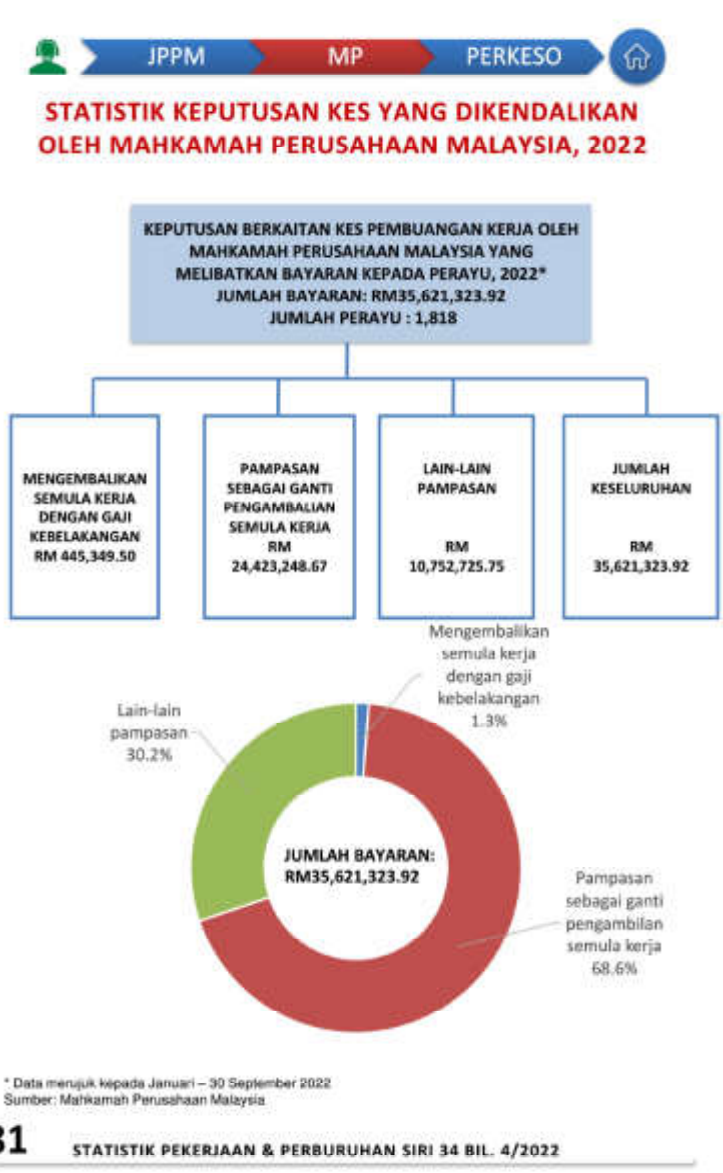
JPPM
MP
PERKESO
STATISTIK KEPUTUSAN KES YANG DIKENDALIKAN OLEH MAHKAMAH PERUSAHAAN MALAYSIA, 2022
KEPUTUSAN BERKAITAN KES PEMBUANGAN KERJA OLEH MAHKAMAH PERUSAHAAN MALAYSIA YANG MELIBATKAN BAYARAN KEPADA PERAYU, 2022*
JUMLAH BAYARAN: RM35,621,323.92
JUMLAH PERAYU : 1,818
MENGEMBALIKAN SEMULA KERJA DENGAN GAJI KEBELAKANGAN RM 445,349.50
PAMPASAN SEBAGAI GANTI PENGAMBALIAN SEMULA KERJA RM 24,423,248.67
LAIN-LAIN PAMPASAN RM 10,752,725.75
JUMLAH KESELURUHAN RM 35,621,323.92
Mengembalikan semula kerja dengan gaji kebelakangan 1.3%
Lain-lain pampasan 30.2%
JUMLAH BAYARAN: RM35,621,323.92
Pampasan sebagai ganti pengambilan semula kerja 68.6%
* Data merujuk kepada Januari – 30 September 2022
Sumber: Mahkamah Perusahaan Malaysia
81
STATISTIK PEKERJAAN & PERBURUHAN SIRI 34 BIL. 4/2022

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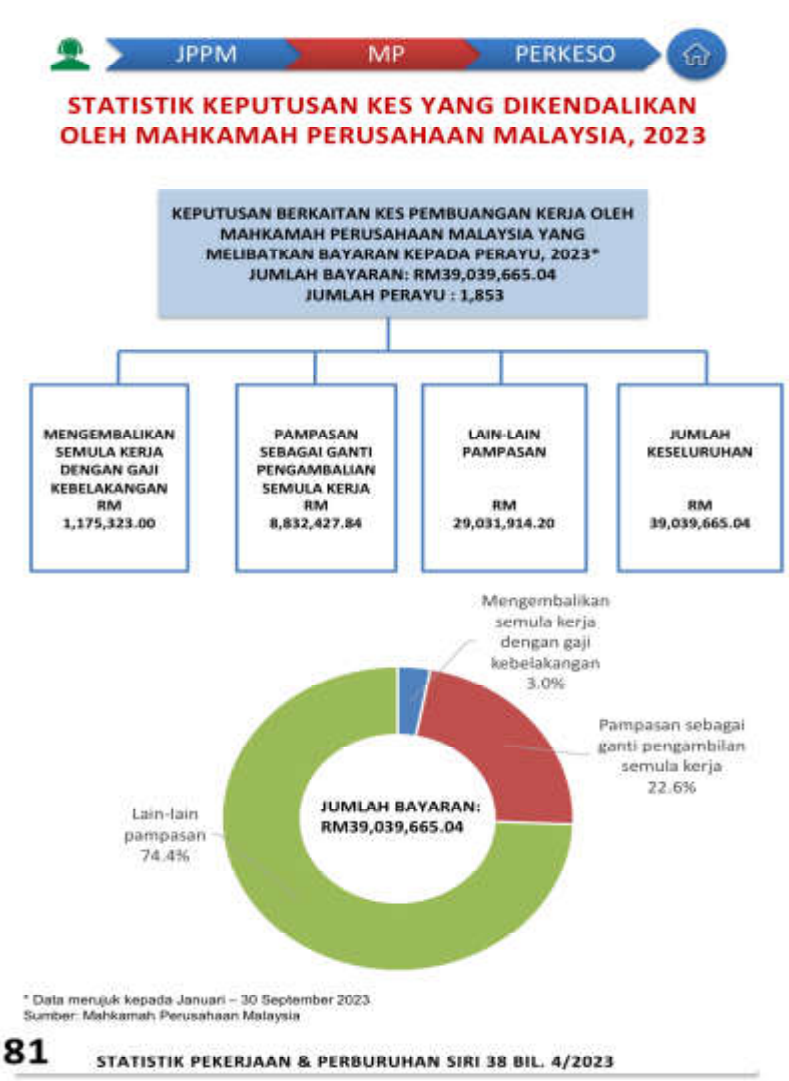
JPPM
MP
PERKESO
STATISTIK KEPUTUSAN KES YANG DIKENDALIKAN OLEH MAHKAMAH PERUSAHAAN MALAYSIA, 2023
KEPUTUSAN BERKAITAN KES PEMBUANGAN KERJA OLEH MAHKAMAH PERUSAHAAN MALAYSIA YANG MELIBATKAN BAYARAN KEPADA PERAYU, 2023*
JUMLAH BAYARAN: RM39,039,665.04
JUMLAH PERAYU : 1,853
MENGEMBALIKAN SEMULA KERJA DENGAN GAJI KEBELAKANGAN RM 1,175,323.00
PAMPASAN SEBAGAI GANTI PENGAMBALIAN SEMULA KERJA RM 8,832,427.84
LAIN-LAIN PAMPASAN RM 29,031,914.20
JUMLAH KESELURUHAN RM 39,039,665.04
Mengembalikan semula kerja dengan gaji kebelakangan 3.0%
Pampasan sebagai ganti pengambilan semula kerja 22.6%
Lain-lain pampasan 74.4%
JUMLAH BAYARAN: RM39,039,665.04
* Data merujuk kepada Januari – 30 September 2023
Sumber: Mahkamah Perusahaan Malaysia
81
STATISTIK PEKERJAAN & PERBURUHAN SIRI 38 BIL. 4/2023

[85] Correspondingly the percentage of cases of compensation *in lieu* of reinstatement were 83%, 68.6% and 22.6% for the years 2021, 2022 and 2023 respectively. It is not that the Industrial Court is out of sync with the intention of Parliament but it is that the Industrial Court takes a hard look at the reality on the ground in the workplace with the passage of time and the fact that to reinstate a workman to his former position or equivalent with no loss of seniority is often impractical and unworkable.

[86] The reason is not difficult to find. By the time the matter is decided by the Industrial Court, some three to four years may have lapsed since termination of the employee. After all, when the IRA was first introduced it was provided under s. 30(3) that:

> (3) The Court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under subsection 20(3).

[87] The delay, perhaps attributed to some extent by the delay on the part of the Minister to refer the matter to the Industrial Courts, have been addressed substantially by the recent amendments effected by the Industrial Relations (Amendment) Act 2020 in making it mandatory for the Director General of Industrial Relations ("DGIR") to refer the dispute to the Industrial Court upon a non-resolution of the dispute by the DGIR under the amended s. 20(3) of the IRA.

[88] In the Court of Appeal case of *Hong Leong Bank Bhd v. Phung Tze Thiam John Phung* [2008] CLJU 921; [2008] 1 LNS 921; [2008] 2 MLJ 785 the Court of Appeal had reversed the High Court granting reinstatement and in the process the Court of Appeal had affirmed the Industrial Court's award in granting compensation *in lieu* of reinstatement. The Court of Appeal observed as follows:

> [19] In the present case, the Industrial Court found that it was not practical for reason of industrial harmony to reinstate the respondent. The High Court was of a different view and ordered reinstatement. With utmost respect, we are unable to agree with the learned High Court judge. **No doubt reinstatement is the usual remedy that is awarded in industrial law. But there may be circumstances where the reinstatement is inappropriate. The present case is such a case**.
>
> [20] The respondent held a *reasonable high ranking position*. He was the head of the appellant's branch in Tawau. On the facts of this case, **mutual trust and confidence is lacking between the parties**. There is no useful purpose, for reason of industrial harmony to thrust the respondent upon the appellant. More so in this case, **the respondent had left the services of the appellant for five and a half years** when the order of reinstatement was made by the High Court. Taking into account all the facts and circumstances of the case, we are of the view that the proper remedy in this case is compensation *in lieu* of reinstatement as ordered by the Industrial Court.
>
> (emphasis added)

[89] There are hardly any reported case from the superior courts on the courts ordering a reinstatement instead of compensation *in lieu* of reinstatement. One such rare case is that for an order of reinstatement where the company had chosen to dismiss a workman purely because of his trade

union activities. Thus, the Court of Appeal in *Harris Solid State (M) Sdn Bhd & Ors. v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747 at p. 778, after highlighting that there could be no clearer case of victimisation and unfair labour practice, observed as follows:

> In the circumstances of the case, we do not consider that compensation is the proper remedy. *For, otherwise, employers will be encouraged to terminate the services of their unionised workmen, confident in the expectation that all they have to face is an award of compensation – a small price to pay for being rid of trade unionists. The remedy of reinstatement is therefore the only just and proper remedy that is appropriate to meet the facts and circumstances of the present case*.
>
> In view of the peculiar facts of this case, we varied the order of the Judge remitting the case to the Industrial Court to the following extent:
>
> (1) all the respondents are hereby forthwith reinstated to the second appellant with no loss of seniority or benefits, monetary or otherwise;
>
> (2) all the respondents are to report for work at the premises of the second respondent at 8am. on 1 October 1996, and those who so fail to report shall lose the benefit of this judgment, save for the order as to costs;
>
> (3) the reinstatement need not be to identical posts as those previously held by the respondents or any of them in the first appellant, but may be to a similar or an equivalent post;
>
> (4) there shall be general liberty to both parties to apply to the High Court in the carrying out of this order.
>
> (emphasis added)

[90] The respondent may want to cite the case of *Novartis Corportion (Malaysia) Sdn Bhd v. Mahkamah Perusahaan Malaysia & Ors* [2022] CLJU 1097; [2022] 1 LNS 1097; [2022] 4 MLJ 818, where the Court of Appeal while agreeing with the High Court and the Industrial Court that the dismissal was without just cause and excuse, nevertheless set aside the order for reinstatement and instead ordered compensation *in lieu* of reinstatement and held as follows:

> [50] Similarly in our case, the third respondent was a high-ranking officer in the company holding the position of chief financial officer which is an executive post. It has been five years since he left the service of the company when the order for reinstatement was made when he was then 55 years old. It may also be inferred that in the intervening period of five years, such a senior position of chief financial officer would have been filled. There was also evidence the third respondent was gainfully employed although earning a fraction of his previous salary. The Industrial Court found that the trust and confidence the company had in the third respondent was not tainted as there was no proven misconduct

A and there was no evidence that the relationship of parties had broken down so badly that it would not be conducive to industrial harmony to return the third respondent to work. Be that as it may, it can be said to be reasonable to infer that given his position in the company's hierarchy, there is no useful purpose for reason of industrial harmony to thrust the third respondent upon the company.

B

[91] However, on appeal, the Federal Court in Civil Appeal 02(f)-88-09-2022(W) on 3 April 2023 allowed the appeal and set aside the decision of the Court of Appeal and reinstate the order of the Industrial Court for reinstatement. See also the cases of *Md Nor Kassim v. Malayan Banking Berhad* [2017] CLJU 506; [2017] 1 LNS 506; [2017] 4 MLJ 71 and *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9 where the Court of Appeal restored the Industrial Court Award of reinstatement, though no reasons were given by the Court of Appeal as to why it had preferred that to compensation *in lieu* of reinstatement.

C

D **[92]** Here, the respondent Mei Chein was terminated on 30 September 2015 and reinstated on 22 September 2021. Some six years have lapsed in a company where that key position has been filled by other heads and basically everyone has moved on with their lives and made the necessary adaptation to changes.

E **[93]** Generally, the higher the position of the terminated employee, the more difficult it would be to order reinstatement where the element of mutual trust and confidence is lacking for at that level of strategy and direction, teamwork is essential and trust is vital. Whilst everyone is important no one is indispensable and the higher one climbs the corporate ladder, the more equipped one would be to survive in any organisation that would appreciate one's skills and experience and some would even venture out on their own rather than being part of a team which environment is toxic from one's perception.

F

[94] This is in contrast to a lower-rung workman who may not be that mobile because an employer would have plenty to choose from a pool of less skilled and experienced employees. In the case of a professional, one has to justify one's existence in a company and when one is almost at the highest tier of being at the director-level with an attractive pay package, very much depends on whether the shareholders of the company would want that employee to continue to be its CEO or CFO or "director" or "head". In fact, most of these positions tend to be for a fix-term such that it would be a loss to the company for failing to retain an excellent CEO and a gain to the employee to have finished his term and to move on to a more challenging job with new heights to scale.

G

H

I

[95] After all work at that director's level would require one to lead in walking in the same direction together in as much as to walk fast one walks alone but to walk far one must walk together with the rest of the team. Having to work with people that one no longer could trust would be stressful and unhealthy psychologically speaking. We hear what the respondent is saying in that she needs to work to feel fulfilled and fruitful as a productive person. No doubt our work is the watershed down which the rest of our lives tend to flow and it gives shape and status as well as dignity to the person.

[96] It is equally true that at that senior level one must accept the things that one cannot change and move on. Versatility and the need to reinvent oneself is much needed especially as one gets older. She is now 57 years old. Granted if she works until the minimum retirement age of 60, she would have another three more years to go and with that, a gratuity of some six months' salary. However, under para. 4 of the Second Schedule to the IRA it is provided that "any relief given shall not include any compensation for loss of future earnings."

[97] There is something about the employment which under common law and contract law, specific performance is not generally granted because of the personal nature of such a contract and this is no different in our industrial jurisprudence where generally compensation *in lieu* of reinstatement is given rather than reinstatement for the reasons given above. It is true that mutual trust and confidence is a matter of perception but when the employer says that it no longer could have that with respect to the senior employee, the element of mutuality is clearly lacking though the employee may insist, as in this case, that she has no problem working in such an environment.

[98] In *JT International Tobacco Sdn Bhd v. Lau Thow Sin* [2006] 2 CLJ 79; [2006] 4 MLJ 251 at p. 89 (CLJ); p. 260 (MLJ) Raus J (later CJ) held that the usual remedy of reinstatement was inappropriate because:

> [26] Similarly in this case, *the respondent held a high ranking position as Human Resources Manager. This is a position of trust and confidence and would avail the respondent with the necessary confidential and sensitive matters relating to the personnel of the applicant*. From the facts of this case, the relation between the applicant and the respondent had turned sour due to lack of mutual trust and confidence. Thus, it would not be appropriate for the Industrial Court to reinstate the respondent to his former position with the applicant.
>
> (emphasis added)

[99] Taking all the delicate and dynamic factors into consideration, this is a fit and proper case for the award of compensation *in lieu* of reinstatement. The compensation of one month's pay for every year of service including the one year that she had worked during the reinstated period would be taken into account and the compensation would be RM32,186 x 25 months = RM804,650 to be paid forthwith by the appellant company to the respondent.

A **Whether The Punitive Damages/Compensation Awarded Was Reasonable In The Circumstances Of The Case**

[100] The High Court had awarded a sum of RM50,000 being punitive compensation in paras. 129 to 132 of its grounds of judgment. We appreciate that such an award would be reserved for those egregious cases where the
B conduct has been high-handed and reprehensible.

[101] Bearing in mind that the quantum is about 1.5 times her basic pay, we are not inclined to disturb it having regard to the fact that this was a retrenchment exercise that resulted in the respondent alone being singled out for retrenchment when the reasons have been found to be wanting.
C

[102] The High Court must have found the actions of the appellant company in presenting a high-powered restructuring scheme to be nothing more than something good for the optics but lacking in substance and sincerity to be serious enough and wanting in probity to justify an award of punitive
D damages.

[103] Such an award is not without precedent and reference may be made to *Sivabalan Poobalasingam v. Kuwait Finance House (Malaysia) Bhd* [2016] 1 ILR 542 where it was held as follows:

> E [53] The learned counsel also cited another case which is on point, the case of *Zakaria Ahmad v. Airasia Bhd* [2014] 3 ILR 201 (Award No 757 of 2014). In this case the court awarded punitive compensation to the employee after finding that the company had acted in bad faith. The court held as follows:
>
> > F The issues are (a) whether the court has the power to grant exemplary or punitive compensation in appropriate cases and (b) if the answer to issue (a) is in the affirmative than what is the quantum that should be awarded in the instant case.
> >
> > As far as issue (a) is concerned, the court's power to grant exemplary or punitive compensation is not prohibited by the Industrial
> > G Relations Act 1967. In fact, the granting of exemplary or punitive compensation is a matter of discretion of the court (see *Warren J Carey v. Coca-Cola Far East Limited (Malaysian Branch) & Anor* [2010] 1 LNS 1474 (High Court Judicial Review) No. R3(2)-25-339-2006.
> >
> > H In the case of *KFC Technical Services Sdn Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan* [1989] 1 ILR 535 (Award no 83 of 1989) and *Soon Bao Corporation Sdn Bhd & Ors v. Kesatuan Pekerja-Pekerja Perusahaan Logam* [2000] 1 ILR 413 (Award no 153 of 2000) punitive compensation was awarded in the sum of 2 months' salary for each year of service.
> >
> > I (and, later, at para 90 of the report).

> After analyzing all the factors, firstly I am fully in agreement with the submission of the Claimants counsel that **awarding of exemplary or Punitive compensation in a particular case** is a question of discretion to be exercised by the court depending on the facts of each particular case. Secondly, based on the facts mentioned above pertaining to the irresponsible manner by which the claimant's case had been dealt by the company, I am fully in agreement with the submission of counsel for the claimant that this is indeed a fitting and proper case for punitive compensation to be awarded. I am of the view that awarding 2 months' salary as punitive compensation (damages) for each year of completed service of his employment *in lieu* of reinstatement is fair and reasonable in addition to backwages.

[54] In the case of *KFC Technical Services Sdn Bhd v. The Industrial Court of Malaysia & Anor* [1992] 1 CLJ 437; [1992] 2 CLJ (Rep) 634, which was referred to above, the applicant filed an application in the High Court for an order of *certiorari* to quash Industrial Court Award No 83 of 1989 [1989] 1 ILR 535 and in the alternative for an order of *certiorari* to quash that part of the award as punitive compensation. The High Court dismissed the application with costs and held as follows:

> I find that the Industrial Court had correctly made the order of payment of compensation to the dismissed employees and having regard to the reasons and circumstances leading to the dismissal of the employees, I think the amount of compensation of two months' salary for each year of service, which the Industrial Court described as punitive compensation, is justified ...
>
> (emphasis added)

[104] In the High Court case of *KFC Technical Services Sdn Bhd v. The Industrial Court Of Malaysia & Anor* [1992] 1 CLJ 437; [1992] 2 CLJ (Rep) 634, the High Court agreed with the Industrial Court that saw through the oblique intention of the appellant company that had closed the maintenance division of the company and found that the true reason for the closure was that the appellant wanted to get rid of the union. Thus, the appellant had acted *mala fide* and having regard to the reasons and circumstances of the dismissal of the 19 workmen the compensation of two months' salary for each year of service which the Industrial Court described as punitive compensation was justified.

Decision

[105] For all the above reasons given, we had dismissed the appeal of the appellant company save to vary the order of the High Court in respect of reinstatement and to order the award of the above compensation *in lieu* of reinstatement calculated as RM32,186 x 25 months = RM804,650 to be paid forthwith by the appellant company to the respondent.

[106] The decision of the High Court is otherwise affirmed together with the award of back wages of RM32,186 x 24 months= RM772,464.

[107] We had also allowed the respondent to work until 31 December 2022 unless the appellant company pays a month's salary *in lieu* of notice to the respondent.

[108] We awarded costs of RM15,000 to be paid by the appellant company to the respondent Mei Chein subject to allocatur.